STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

DONALD WAYNE KUNKEL, Charging Party, v. STATE OF CALIFORNIA, Respondent.	Case No. SF-CE-223-S PERB Decision No. 1617-S April 16, 2004

Appearances: Donald Wayne Kunkel, on his own behalf; State of California (Department of Personnel Administration) by Tricia M. Keegan, Staff Counsel, for State of California.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

NEIMA, Member: This case is before the Public Employment Relations Board (Board) on appeal by Donald Wayne Kunkel (Kunkel) of a Board agent's dismissal (attached) of his unfair practice charge. The charge alleged that the State of California (State) violated the Ralph C. Dills Act (Dills Act)[1] by retaliating against Kunkel for his protected activities.

The Board has reviewed the entire record in this matter, including the unfair practice charge, the warning and dismissal letters, Kunkel's appeal and the State's response. The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself.

[1]The Dills Act is codified at Government Code section 3512, et seq.

ORDER

The unfair practice charge in Case No. SF-CE-223-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Whitehead joined in this Decision.

Dismissal Letter

June 18, 2003

Donald Wayne Kunkel
P. O. Box 373
Crockett, CA 94525

Re: Donald Wayne Kunkel v. State of California
Unfair Practice Charge No. SF-CE-223-S
DISMISSAL LETTER

Dear Mr. Kunkel:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on May 2, 2003. Donald Wayne Kunkel alleges that the State of California violated the Ralph C. Dills Act (Dills Act)[1] by discriminating against him because of his protected activity.

I indicated to you in my attached letter dated May 22, 2003, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to May 29, 2003, the charge would be dismissed.

I have not received either an amended charge or a request for withdrawal. On June 13, 2003, this office received approximately 75 pages of material, most of which consisted of photocopies of certified mail receipts. There is no indication that this material was served on the Respondent. I will summarize the additional materials below as well as those facts provided and my communication with you regarding this charge.

You are employed by the State of California, Department of Transportation as an Equipment Operator II. As such, you are exclusively represented by the International Union of Operating Engineers (IUOE). The State and IUOE are parties to a collective bargaining agreement which expires on July 2, 2004. Article 14.10 of the Grievance Procedure provides for the binding arbitration of grievances. Article 20.3 prohibits discrimination based upon protected activities.

In May 2000, you were issued a Letter of Warning for failing to follow the proper chain of command when attempting to change your schedule while on duty.

[1] The Dills Act is codified at Government Code section 3512 et seq. The text of the Dills Act and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

In early 2001, you filed a complaint with the Air Quality Board, asserting violations of State law. The Air Quality Board's review found no violation. It does not appear your supervisors were aware of this conduct.

On June 19, 2001, you were issued a Notice of Adverse Action from the Department. The Notice terminated your employment with the State.

On June 21, 2001, the California Highway Patrol and Sheriffs' Office responded to an anonymous call regarding your welfare. When the officer's arrived at your home, you indicated that you had been suicidal on the previous day and that you were in possession of two firearms. The officers transported you to the County Medical Center for a psychiatric evaluation and removed the firearms from your home. Your attempts to seek return of those firearms have failed.

On June 27, 2001, you and the State agreed to modify the Notice of Adverse Action into a settlement agreement suspending you without pay for six (6) months, demoting you for six (6) months and ordering you to attend anger management courses. After agreeing to the settlement, you attempted to schedule an SPB hearing regarding the Adverse Action. To that end, you contacted SPB and the Division of Judges. You did not inform IUOE of these attempts, and they did not learn of your attempted appeal until informed by SPB. IUOE indicated to SPB and the State that the settlement agreement was being circulated for signatures and was still the parties' understanding regarding the Adverse Action.

In May 2002, Transaction Supervisor Paula Sypnicki filed a harassment complaint against you. At that time, Regional Manager Rich Olander instructed you to follow the proper chain of command and not to directly contact Transaction personnel.

On September 10, 2002, your Leadworker Dennis McPherson instructed you to turn over your Department identification badge in order to secure you a new badge. You refused to surrender your badge, stating you did not have it with you. Department policy requires you to be in possession of your identification card while at work.

On February 18, 2003, supervisor Chuck Hazelwood presented you with information you had requested on temporary transfers. Upon receiving this information, you crumpled up the paper and tossed it into the trash.

On February 23, 2003, the Department attempted radio contact with you for approximately 45 minutes. You did not respond to these calls. An inspection of your vehicle found that the radio was working properly.

On February 28, 2003, Mr. Hazelwood verbally reprimanded you for representing yourself as the Department's representative for bridge reconstruction issues. Apparently such duties are not within your scope of responsibilities.

In March 2003, you contacted the Transaction Department without following the chain of command as instructed. The Department contends this action disrupted the department and forced them to complete unnecessary research for you.

On March 14, 2003, you and fellow employee Paul Johnson conducted a security inspection of the Benicia bridge. During this inspection, you "abandoned your assignment" and left your coworker alone to complete the inspection. Departmental rules state that inspections are to be conducted in pairs.

On March 17, 2003, Mr. McPherson presented you with your Individual Development Plan. Mr. McPherson instructed you to complete a portion of the IDP and return it to Mr. Hazelwood. Your reaction to this memorandum was to tear the paper up and state "fuck them assholes."

On March 21, 2003, while hooking up a warning trailer to a cone truck, you failed to release the parking brake on the trailer and dragged the trailer approximately 100 feet, leaving skid marks in the parking lot. When questioned by Department personnel, you stated that you knew the parking brake was on and stated "Oh well." An accident report was filed over this incident.

On March 24, 2003, you and your fellow coworkers were instructed to attend a safety meeting. During this meeting, Mr. Hazelwood requested that you stop "tapping" the deck of cards in your hand on the desk, as it was disrupting the meeting. You complied with this request, and then picked up a newspaper and began to read that during the meeting. On March 26, 2003, during a staff meeting, you were again instructed to stop "tapping" the deck of cards on the desk. When you put down the deck of cards, you picked up a magazine and began reading it instead of paying attention to the meeting. When Mr. Hazelwood asked you to put down the magazine and join the rest of the staff at the table, you refused stating "I can hear you from where I'm at."

On April 7, 2003, you received a second Notice of Adverse Action. The Notice suspends you without pay for six (6) months.

On May 27, 2003 and June 3, 2003, we spoke at length regarding your allegations and your Warning Letter. During these conversations, I explained that PERB would investigate your allegations of discrimination and render a decision based on the facts you and the State provided. You were also informed that any and all documents you sent to PERB must be served on the State of California, Department of Personnel Administration. I further indicated that PERB could not rely on verbal conversations with you in rendering its decision. Additionally, on May 27, 2003, I explained that the charge lacked specifics regarding your protected activity and why you believed you were being singled out for discrimination. I then extended your deadline until June 6, 2003.

On June 3, 2003, I received a telephone message from Dottie Egel, Chief Counsel for the State Personnel Board. Ms. Egle stated that you had informed SPB that PERB would be representing you in your appeal of your dismissal and suspension.

On June 4, 2003, I sent you the attached letter reiterating our May 27, 2003 and June 3, 2003, conversations. I further noted that I had extended your deadline until June 12, 2003. On June 9, 2003, we again spoke by telephone about your charge and my June 4, 2003, letter. I again reiterated PERB's role in investigating your charge and the need for you to indicate what, if any, protected activity you engaged in.

Based on the above stated facts, and those provided in the original charge, the charge fails to state a prima facie violation of the Dills Act, for the reasons provided below.

To demonstrate a violation of Dills Act section 3519(a), the charging party must show that: (1) the employee exercised rights under the Dills Act; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employees because of the exercise of those rights. (Novato Unified School District (1982) PERB Decision No. 210 (Novato); Carlsbad Unified School District (1979) PERB Decision No. 89.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (North Sacramento School District (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (Santa Clara Unified School District (1979) PERB Decision No. 104.); (3) the employer's inconsistent or contradictory justifications for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S; (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; (6) employer animosity towards union activists (Cupertino Union Elementary School District) (1986) PERB Decision No. 572.); or (7) any other facts which might demonstrate the employer's unlawful motive. (Novato; North Sacramento School District, supra, PERB Decision No. 264.)

As noted in my May 22, 2003, letter and in each subsequent conversation we have had, the charge fails to provide any facts regarding protected activity. While you made a request to the Air Quality Board in early 2000, there is no evidence that your employer was aware of this complaint. During our verbal conversations, you indicated you had participated in some union activity in 1999, and I instructed you to provide a written explanation of those events. None of the information you have provided mentions this early protected activity and you have failed to provide a written explanation of the protected activity. As such, this charge is dismissed as it fails to provide any protected activity and any of the relevant nexus factors.

Right to Appeal

Pursuant to PERB Regulations,[2] you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Regulation 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Regulations 32135(a) and 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Regulations 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Regulation 32635(b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Regulation 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail, postage paid and properly addressed. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

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[2] PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Regulation 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

ROBERT THOMPSON
General Counsel

By _____
Kristin L. Rosi
Regional Attorney

Attachment

cc: Patricia Keegan

Warning Letter

May 22, 2003

Donald Wayne Kunkel
P. O. Box 373
Crockett, CA 94525

Re: Donald Wayne Kunkel v. State of California
Unfair Practice Charge No. SF-CE-223-S
WARNING LETTER

Dear Mr. Kunkel:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on May 2, 2003. Donald Wayne Kunkel alleges that the State of California violated the Ralph C. Dills Act (Dills Act)[1] by discriminating against him because of his protected activity.

Investigation of the charge revealed the following. The charge itself is devoid of a statement of facts and includes only a copy of the April 7, 2003, Notice of Adverse Action, the first page of the Stipulated Settlement Agreement, and a two page list of statutes you believe have been violated. The following facts have been gleamed from the limited information provided.

You are employed by the State of California, Department of Transportation as an Equipment Operator II. As such, you are exclusively represented by the International Union of Operating Engineers (IUOE). The State and IUOE are parties to a collective bargaining agreement which expires on July 2, 2004. Article 14.10 of the Grievance Procedure provides for the binding arbitration of grievances. Article 20.3 prohibits discrimination based upon protected activities. With regard to Discipline, Article 15 states in relevant part:

> c. The notice shall include:
> (1) A statement of the nature of the discipline;
> (2) The effective dates of the action;
> (3) The reason for the action in ordinary language;
> (4) A statement advising the employee that s/he may answer orally or in writing in advance of the effective date to a representative of the appointing authority who has the authority to make or recommend a final disciplinary action;

[1] The Dills Act is codified at Government Code section 3512 et seq. The text of the Dills Act and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

(5) A statement advising employees subject to major discipline about their right to file a grievance or appeal to the State Personnel Board;
(6) A statement advising the employee of the time within which a grievance must be filed, and the name of the person specified by the State with whom the grievance must be filed; and,
(7) A copy of all materials upon which the action is based.

On June 19, 2001, you were issued a Notice of Adverse Action from the Department. The Notice terminated your employment with the State. On June 27, 2001, you and the State agreed to modify the Notice of Adverse Action into a settlement agreement suspending you without pay for six (6) months, demoting you for six (6) months and ordering you to attend anger management courses.

In May 2002, Transaction Supervisor Paula Sypnicki filed a harassment complaint against you. At that time, Regional Manager Rich Olander instructed you to follow the proper chain of command and not to directly contact Transaction personnel.

On September 10, 2002, your Leadworker Dennis McPherson instructed you to turn over your Department identification badge in order to secure you a new badge. You refused to surrender your badge, stating you did not have it with you. Department policy requires you to be in possession of your identification card while at work.

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In March 2003, you contacted the Transaction Department without following the chain of command as instructed. The Department contends this action disrupted the department and forced them to complete unnecessary research for you.

On March 14, 2003, you and fellow employee Paul Johnson conducted a security inspection of the Benicia bridge. During this inspection, you "abandoned your assignment" and left your coworker alone to complete the inspection. Departmental rules state that inspections are to be conducted in pairs.

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On April 7, 2003, you received a second Notice of Adverse Action. The Notice suspends you without pay for six (6) months.

Based on the above stated facts, the charge as presently written fails to state a prima facie violation of the Dills Act, for the reasons provided below.

To demonstrate a violation of Dills Act section 3519(a), the charging party must show that: (1) the employee exercised rights under the Dills Act; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employees because of the exercise of those rights. (Novato Unified School District (1982) PERB Decision No. 210 (Novato); Carlsbad Unified School District (1979) PERB Decision No. 89.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (North Sacramento School District (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (Santa Clara Unified School District (1979) PERB Decision No. 104.); (3) the employer's inconsistent or contradictory justifications for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S; (4) the employer's

cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; (6) employer animosity towards union activists (Cupertino Union Elementary School District) (1986) PERB Decision No. 572.); or (7) any other facts which might demonstrate the employer's unlawful motive. (Novato; North Sacramento School District, supra, PERB Decision No. 264.)

Herein, the charge fails to provide any evidence of your protected activity. Although there is a passing reference to "whistleblower" statutes, nothing in the charge provides specific facts regarding protected activity. The charge does not state what activity you engaged in, when such actions took place or how the State became aware of your protected activity. PERB Regulation 32615(a)(5) requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." Thus, the charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (State of California (Department of Food and Agriculture) (1994) PERB Decision No. 1071-S, citing United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (Ibid.; Charter Oak Unified School District (1991) PERB Decision No. 873.)

Additionally, the charge fails to provide any facts demonstrating nexus as there are no facts demonstrating other employees who damaged Department equipment, disrupted Department meetings or disobeyed Departmental rules were not similarly punished. As such, this charge fails to state a prima facie case.

Moreover, even assuming you engaged in protected activity and could demonstrate the requisite nexus, the charge still fails to state a prima facie case within PERB's jurisdiction. Section 3514.5(a) of the Dills Act states, in pertinent part, that PERB shall not:

> Issue a complaint against conduct also prohibited by the provisions of the [collective bargaining] agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration.

In Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81a, the Board explained that:

> While there is no statutory deferral requirement imposed on the National Labor Relations Board (hereafter NLRB), that agency has voluntarily adopted such a policy both with regard to post-arbitral and pre-arbitral award situations.[2] EERA section 3541.5(a) essentially codifies the policy developed by the NLRB regarding deferral to arbitration proceedings and awards. It is appropriate, therefore, to look for guidance to the private

> sector.[3] [Fn. 2 omitted; fn. 3 to Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608.]

Although Dry Creek was decided under the Educational Employment Relations Act[2] the NLRB deferral standard has also been applied to the Dills Act. (State of California (Department of Food and Agriculture) (2002) PERB Decision No. 1473-S.)

In Collyer Insulated Wire (1971) 192 NLRB 837 [77 LRRM 1931] and subsequent cases, the National Labor Relations Board articulated standards under which deferral to the contractual grievance procedure is appropriate in prearbitral situations. These requirements are: (1) the dispute must arise within a stable collective bargaining relationship where there is no enmity by the respondent toward the charging party; (2) the respondent must be ready and willing to proceed to arbitration and must waive contract-based procedural defenses; and (3) the contract and its meaning must lie at the center of the dispute.

These standards may be met with respect to this case. First, no evidence has been produced to indicate that the parties are not operating within a stable collective bargaining relationship. Second, the issue raised by this charge that the Stated discriminated against you because of your protected activity directly involves an interpretation of 20.3 of the collective bargaining agreement. Finally, should the State choose to waive procedural defenses in this case, this charge would be subject to deferral.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, please amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before May 29, 2003, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

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[2] The Educational Employment Relations Act is codified at Government Code section 3540 et seq.

Sincerely,

Kristin L. Rosi
Regional Attorney

KLR